(38)

IN THE

Supreme Court of the United States

October Term, 1942.

No. 421

JOHN J. FULTON COMPANY, a corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUBECT INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

MISCELLANEOUS.

STATUTES.

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To the Honorable Supreme Court of the United States:

The petition of John J. Fulton Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on July 21st, 1942, affirming a decision of the Federal Trade Commission.

Opinions Below.

The order to cease and desist [R. 53, 65] is reported in 33, F. T. C. Dec. 218. The opinion of the Circuit Court of Appeals [R. 381] is reported in ..... Fed. (2d) .....

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 21st, 1942. The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A., Section 347.)

Reference is made, also, to Rule No. 38-5(b) of the Supreme Court, wherein is specified some of the reasons which will be considered by the Supreme Court in the exercise of its sound judicial discretion with respect to the issuance of writs of certiorari.

Statute Involved.

Sections 5 (a) and 12 (a) of the Federal Trade Commission Act (15 U. S. C. A. 45, 52).

Statement of Matter Involved.

The action below is in review of a cease and desist order of the Federal Trade Commission against petitioner, a South Dakota Corporation, with its place of business at 88 First Street, San Francisco, California.

The statement in the Circuit Court opinion is so concise, and at the same time states the Commission's case against petitioner so fully, that it is respectfully quoted [R. 381], as follows:

THE COMPLAINT.

> "In a proceeding before the Federal Trade Commission, here under review, petitioner was ordered to desist from advertising its product, Uvursin, as an effective treatment for diabetes.
>
> "Petitioner advertised the preparation in medical journals and in circulars distributed to the profession.

Typical representations determined by the Commission to be false were that Uvursin 'is a mild and innocuous oral treatment for diabetes mellitus'; that it is an efficacious treatment; that diabetic gangrene 'yields to Uvursin'; and that the product 'is being recognized as the preferred treatment in diabetes mellitus.' In conjunction with the drug a rigid diet was recommended."

Diabetes.

"Diabetes results from a decrease in the internal secretion of the pancreas manifesting itself by an abnormal elevation of the blood sugar and also by the appearance of sugar in the urine."

Insulin Treatment.

Approved With Diet.

"The modern and accepted way of controlling the disease is by diet and the hypodermic injection of insulin adjusted to meet the needs of each patient."

Uvursin Treatment.

Attributed to Diet Only.

"The Commission found that petitioner's preparation is largely a compound of herbs long enjoying a reputation, particularly in folklore medicine, for the treatment of urinary conditions. Some of the herbs were anciently prescribed for use in the form of tea for the alleviation of bladder and kidney diseases. In diabetic cases the effect of these drugs is illusory. By increasing the flow of the urine they dilute its sugar content, while the actual condition of the patient remains as before. Uvursin, without diet, was found to be devoid of therapeutic value in the treatment of the malady."

COMMISSION'S WITNESSES ACCEPTED ON GENERAL KNOWLEDGE ONLY.

"The findings have support in the testimony of expert witnesses called by the Commission. But the petitioner argues that since none of the experts had prescribed Uvursin or observed its effects in concrete cases their testimony was incompetent and inadmissible. We think otherwise. The witnesses were shown to possess wide knowledge in the field under inquiry. There is no good reason to suppose them incompetent to express an opinion as to the lack of therapeutic value of petitioner's preparation merely because they had had no personal experience with it in the treatment of the disease. Their general medical and pharmacalogical knowledge qualified them to testify. *Justin Haynes & Co. v. Federal Trade Commission*, 2 Cir., 105 F. 2d 988, 989, cert. den., 308 U. S. 616; *Neff v. Federal Trade Commission*, 4 Cir., 117 F. 2d 495, 496-497; *Goodwin v. United States*, 6 Cir., 2 F. 2d 200, 201; *Dr. W. B. Caldwell Inc. v. Federal Trade Commission*, 7 Cir., 111 F. 2d 889, 891."

PETITIONER'S WITNESSES DISREGARDED.

"Several medical witnesses called by petitioner testified to the efficacy of Uvursin in particular cases in their own practice; but since none of them was shown to have administered the drug under proper scientific controls, the Commission was of the belief that their evidence had little probative value as compared to expert testimony based on general knowledge."

ASSUMPTIONS AGAINST PETITIONER AND UVURSIN.

"It was thought—and there is much evidence to justify the finding—that in diabetic cases there may be spontaneous or temporary remissions, depending in

part on the character of the diet. The Commission was clearly entitled to accept the testimony of experts in the general field. Justin Haynes & Co. v. Federal Trade Commission, *supra; cf.* Alberty v. Federal Trade Commission, 9 Cir., 118 F. 2d 669, 670, cert. den., 314 U. S. 630."

COMMISSIONER'S WITNESS WANTED CLINICAL TEST.

"Prior to the hearing a witness for the Commission had obtained Uvursin in the thought of making a controlled test on diabetic patient in the Los Angeles County Hospital, but after consultation with a colleague he abandoned the idea because of his fear that the preparation might contain synthalin, which is a liver poison; and the witness was reluctant to expose his patients to the risk. The witness testified that some oral patent nostrums for the control of diabetes have contained the substance, although it was not mentioned in the advertising matter, and that it is very difficult to show the presence of synthalin by chemical methods. Petitioner intimates that the decision adverse to the making of the experiment was in some way induced or inspired by the Commission, but there is nothing whatever in the record to support the argument. It goes without saying that the petitioner was itself at liberty to have clinical tests of this character conducted and to present the results to the Commission if it saw fit."

INSULIN MONOPOLY.

"It is urged that the Commission's order tends to promote monopoly and is against the public interest; and that 'medicine which can bring bona fide relief to the afflicted' ought to be encouraged rather than the reverse. But a study of the record dissipates any feeling of apprehension that the public will suffer injury from the action taken here."

Danger in Insulin Monopoly.

The Department of Commerce, Bureau of the Census, has recently issued a special vital statistics report, dated August 4, 1942, which gives a mortality summary, for U. S. Registration States, on diabetes mellitus. This report is hereto attached, in the appendix.

Table A shows that deaths from diabetes mellitus increased between 1923, when Insulin came into general use [R. 107], and 1940 from 17,153 to 35,015, and that the death rate for 100,000 estimated population increased between these years from 17.7 to 26.6.

Qualification of Commission's Witnesses?

The findings of the Commission, adopted by the Court, state the qualification of the Commission witnesses:

> "On the subject of the therapeutic value of respondent's preparation Uvursin three expert witnesses were called at the instance of the Commission. Two of these witnesses," Doctors Leake and Thienes, "were Professors of Pharmacology in outstanding medical schools and had devoted much study to the subject of diabetes. The third witness," Dr. Modern, "was a practicing physician many years' experience specializing in diabetes and who was at the time of the hearing, in charge of one of the diabetic services at the Los Angeles County General Hospital," [R. 58.]

Lack of Knowledge of Drs. Leake and Thienes.

Dr. Leake never used Uvursin in the treatment of a patient [R. 240], and never personally saw a patient in the course of treatments with Uvursin. [R. 241.] In his general experiments and studies with some of the constituents of Uvursin, he never had diabetes in mind:

> "Except I think there was a consideration of the use of dandelion in diabetes as a part of some—it is rather vague in my mind at the time—some folklore notion in that respect and I think we have also investigated the action of methyl salicylate on sugar metabolism, although again I can't answer you directly. My memory is hazy on those points." [R. 243-4.]

Dr. Thienes never heard of Uvursin except in connection with this hearing [R. 137], had never used it, nor seen it used. [R. 145.]

Dr. Modern Wanted Clinical Test.

Dr. Modern, the third witness, and physician in the diabetic service at the Los Angeles General Hospital, never used Uvursin [R. 96], but wanted to give it a clinical test:

> "I want to be perfectly fair in this thing. I obtained a supply from the J. J. Fulton Company of Uversin. I was all set to go ahead on my service in the County Hospital, to go ahead under controlled conditions using this product, that is, put the patient first on a diet, then give him Uversin; then take Uversin away. In other words, see how the thing acts in the same patient. * * *" [R. 110.]

Dr. Modern wrote the Commission Agent in charge of this case:

> "* * * Shortly after your visit here, I had the Fulton Company send me a sample of Uversin, which I intended to use on my Diabetic Service at the County Hospital. Before doing so, however, I conferred with Doctor Thienes (one of the other 'experts'), who told me that many of these preparations contain synthalin, which is a guanidine derivative and is very difficult to demonstrate by chemical methods. Synthalin is a liver poison, so I did not wish to expose my patients to that potential danger. * * * I am sorry that I could not make my clinical trial as I intended to do." [R. 113.]

The ingredients of Uvursin were determined by the Commission. They do not include synthalin. [R. 59.]

Trial Examiner's Report on Dr. Cowles' Qualifications and Testimony.

> "Dr. D. C. Cowles of Fullerton, California, was called as a witness by the respondent and stated that he graduated from the University of Minnesota in 1901. After graduating from the University of Minnesota, for 15 years he practiced in the City of Minneapolis, Minnesota, and then came to California, where he has been actively engaged in the practice of medicine since that time, and at the present time he considers himself an 'all round' doctor of medicine surgery. At the present time he is a member and past president of the County Medical Society, a member of the Southern California Medical Society, the

Surgical Southern Medical Society, and the California Medical Society, and the American Medical Association." [R. 28.]

"Witness testified he had foreign affiliations, having done post-graduate work in Hotel Du Diu, Paris, and Guys' Hospital in London, and at Berlin in the Frauen Clinic, and the Allgemine Kranken Haus in Wien, and the All States Hospital in Rome." [R. 28.]

"He has had a number of cases of diabetes such as usually come to a country practitioner. His first treatment for such cases has always been Insulin, but later on he has changed them to Uvursin, because it was more convenient, more satisfactory and cheaper." [R. 28.]

"Witness related a case in which it was necessary to amputate both of a diabetic patient's lower limbs, and trouble was experienced in getting them to heal properly. After giving the patient Insulin for sometime, without any effect, the witness changed to Uvursin and in five days' time a remarkable recovery was noticed." [R. 28-29.]

"In another case, the patient was a man 81 years of age afflicted with chronic diabetes combined with cancer of the pancreas. The witness testified that in this case the only treatment given was a diet and Uvursin." [R. 29.]

"Witness also related another case in which the patient was 52 years of age and had chronic diabetes. He was first called to treat him in 1934 and the man

is alive and well today. He still comes in once in every two weeks for a checkup. The only treatment given this patient was Uvursin." [R. 29.]

"The witness testified that it was his opinion that Uvursin has a therapeutic value and that he intends to continue its use in treating diabetes, because he has found it a mild treatment and it has proved very successful in his treatments." [R. 29.]

"He has had good results in using Uvursin in the treatment of gangrene. He testified that there are certain cases of diabetes which the use of diet alone will control and it is not necessary to give Uvursin in these cases; although it was his experience that by the administration of Uvursin with the diet better results follow. The witness testified that diabetes is incurable but he has been quite successful in treating it with Uvursin." [R. 29.]

A more complete statement of the testimony of Dr. Cowles is contained in petitioner's exceptions to the report of the Trial Examiner [R. 42-51] and given in part in the Appendix hereof.

The Questions Involved.

The issues involved are:

1. Are the findings against Uvursin true?

2. Did the Court err in the application of *Justin Haynes & Co. v. Federal Trade Commission,* and kindred cases, (1) in qualifying the Commission witnesses and their testimony, and (2) in disregarding proof from the practice and experience of an eminently qualified physician?

3. Was it against public policy for the Commission not to permit its own witness, in search of knowledge, to qualify by making the clinical test he had set up and desired in a great hospital, and for the Circuit Court not to order and direct said test as prayed by petitioner?

4. Is the Cease and Desist Order of the Commission, and its affirmance by the Circuit Court, conducive to monopoly, and against public policy in view of the increasing mortality rate of diabetes?

5. Should the order and its affirmance be reversed upon the competent proof before the Court?

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein is in conflict in principle with decisions of other Circuit Courts of Appeal.

2. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

3. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure, or so far sanctioned such a departure by the Federal Trade Commission, as to call for an exercise of this Court's power of supervision.

ZACH LAMAR COBB,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that the said petition is not interposed for delay.

Dated this 24th day of September, 1942.

ZACH LAMAR COBB,
Counsel for Petitioner.